IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 416.

WILLIAM BURTON, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR THE PETITIONER.

The brief of the Government serves only to make plain the general importance of the principal question raised in the petition—a question which may reasonably be expected frequently to recur in the future in the trial of criminal cases in the federal courts:

Whether the privilege recognized in the *Clark* case, after an accused juror's individual ballot has been put in evidence, bars defense cross-examination to show—without

referring to any individual juror's vote—the total number of votes for acquittal in the ballots of a discharged jury.

I.

The Government, in seeking to uphold the prohibition of cross-examination as to the number of votes for acquittal, relies on five contentions none of which will bear analysis:

(a) "The sole articulate point of dispute between defense counsel * * * was the legitimacy of that line of questioning as a means of testing Adams' *memory and credibility* in respect to his direct testimony * * *" (Govt. Br. 11-15). (Emphasis supplied)

The Government ignores the record. The question by defense counsel was (R. 545):

> "How many others voted for not guilty?"

The issue was raised by objection of the Government (R. 545):

> "Just before you answer that question, I would like to make an objection, on the ground that it is entirely *irrelevant* and *immaterial* what anybody else did." (Emphasis supplied)

Expressly recognizing privilege as not involved[1] Government counsel reiterated (R. 549):

> "But you do have a question of relevancy, and I think it is absolutely irrelevant for the defense to try to bring in what the other jurors did."

(R. 550):

> "Whatever the other jurors did, we respectfully submit is entirely irrelevant and inadmissible."

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[1] Government Attorney Weinstein said (R. 549): "And I think under the *Clark* case, it is very clear that in a situation such as this, the privilege is out the window * * *".

The issue thus presented was whether the question was proper cross-examination, i.e., relevant to the testimony on direct. This was recognized by the court as the question raised. It was the question decided. The court said (R. 552):

> "I am convinced in my own mind that it is entirely irrelevant and it is immaterial how other jurors voted in this proceeding."

(R. 553):

> "I simply state at this time that I take it it will be improper to ask the witness how the balance of the jury voted in this case. I don't think it is proper."

The Government's assertion that petitioner is tardy in making his contention that this was proper cross-examination: (1) erroneously assumes that the cross-examiner must preface each question by assigning a proper ground therefor and ignores the fact that the issue was raised by its own objection, based solely on the ground of irrelevance, and (2) ignores that defense counsel arguing the point directly stated (R. 552):

> "—it would be more unfair to have it appear here now that LaBranche was the only one who voted that way, without good reason and without good cause. Relevancy, after all, is a matter of logic and logic, of course, is common sense, and a question of common sense."

The Government (Govt. Br. 15) in its attempt to minimize the record showing the ground upon which the issue was decided not only ignores the clear showing that irrelevance was the objection by it asserted, but as well displays the frivolous nature of its position for it complains (Govt. Br. 15, Note 4) merely that defense counsel did not assert more frequently or at greater length, the obvious point that the number of votes for or against acquittal was a circumstance directly affecting the probative weight of the fact of LaBranche's vote for acquittal, which in turn was of-

fered "to further corroborate and link in all of our [Government's] evidence" (R. 548).

(b) The Government attempts to blur the question by stating it to be whether the court properly refused "to permit the defense to cross-examine the witness as to how the other jurors finally voted." (Govt. Br. 2).

No inquiry was addressed to how any other juror voted. The issue here is whether the defense may cross-examine as to how *many* jurors voted for acquittal.

Obviously, suppression of that fact is in no way essential to attain the ends which gave rise to recognition of the privilege.

(c) The Government assumes that *Clark* v. *United States*, 289 U. S. 1, recognized an abstract or group privilege against disclosure of the number of votes each way by a discharged jury. The basic error of the Government and of the courts below seems largely attributable to a failure carefully to consider the exact nature and precisely to define the limitations of the privilege involved.

As stated by Mr. Justice Cardozo, in that case, 289 U. S. 1, 13, the privilege involved "has its origin in inveterate but *vague* tradition and where no attempt has been made either in treatise or in decisions to chart its limits with precision." (Emphasis supplied) The only privilege there assumed, but held there to have taken flight, was "a privilege which protects from impertinent exposure the arguments and ballots of *a juror* while considering his verdict." (Emphasis supplied) *Clark* v. *United States, supra* pp. 13-14.

Obviously it does not invade the privilege of an individual juror as defined in the *Clark* case nor does it encroach upon the purposes underlying the public policy on which the privilege is based to disclose the total vote for acquittal. The cross-examination was not directed to the disclosure of the arguments and ballots of any other juror or identifiable jurors. The secrecy of the ballot is not invaded by announcement of the results of an election.

The absence of any privilege is emphasized by the Government's ingenuous suggestion (Govt. Br. 23, Note 6) as to how the fact that others voted for acquittal should be shown, i.e., by calling each juror. The argument that "each juror could then have claimed or waived, if he saw fit, his privilege not to disclose his manner of voting" high-lights the fact that as against disclosure of the totals of the balloting each such juror had no privilege to assert or waive.

That the Government is arguing for protection of a privilege in no way here invaded is also made plain in the same footnote where it states (Govt. Br. 23, Note 6):

> "Adams had no right to waive the personal privilege of each of the other jurors against disclosure of his vote."

Obviously there was no threat of the disclosure of the vote of any juror.

In any event, it seems clear that even if the privilege is as broad as the Government contends, it was, as Government counsel conceded at the trial, "out the window" once the testimony as to the accused juror's vote went in.

(d) The holding in the *United State* v. *Manton,* 107 F. 2d 844, 845, 846, that a determination of a correct vote by the judge would not, as the defense there contended require acquittal, is now relied upon as demonstrating irrelevance of the vote of the hung jury in this case. This argument signally fails to distinguish between the issue of admissibility of evidence on cross-examination as a plane of reference by which to evaluate direct testimony, and the issue of law whether such evidence, if believed, would require acquittal. No one has ever contended that showing that there were a substantial number of votes for acquittal, would as a matter of law have required acquittal in this trial.

(e) The permitted but inconclusive testimony on cross-examination that certain of LaBranche's fellow jurors changed their vote some time during the trial to which the

Government points as minimizing the error (Govt. Br. 22) fell far short of mitigating the possibility that the jury concluded that Burton was the only juror finally to vote for acquittal.

II.

The argument of the Government as to the exclusion of the grand jury minutes, offered as extrinsic evidence of the bias and interest of Government witness Astorias, fails to distinguish between prior statements of the witness evidencing bias and extrinsic evidence of such bias (See Pet. p. 17).

Regardless of whether the defense has opportunity to, or does in fact, cross-examine the witness on such extrinsic evidence of bias, it is proper to prove his hostility by other means. (Pet. pp. 21-22 and authorities cited).

Notable for its complete lack of supporting citations is the Government's purported distinction of petitioner's authorities (Govt. Br. 25-26) on the ground that petitioner had the opportunity to cross-examine the witness in detail but did not fully avail of this opportunity.

Cursory examination of *United States* v. *Krulewitch*, 145 F. 2d 76, will disclose the lack of support for the distinction the Government attempts to make. There the court held the prior statement competent to contradict the testimony of the witness and emphasized that even though on her cross-examination she had testified it to be false (thus impliedly admitting having made it), such testimony is not the equivalent, or bar to introduction, of the contradictory statement itself.[2]

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[2] This ruling was independent, of course, of the procedural objection, urged by the Government and there overruled by the court, that the accused had not offered the statement in evidence but merely demanded inspection. The court pointed out that because foundation is essential in case of prior contradictory statements, such inspection was necessary to examination for the purpose of laying foundation.

CONCLUSION.

It is respectfully submitted that the record clearly demonstrates the *Clark* case to have been erroneously interpreted and misapplied so unduly to limit cross-examination and prejudice petitioner's right to fair trial as to require the intervention of this Court.

HOMER CUMMINGS,
EDWARD H. MILLER,
JOHN B. HUFFAKER,
Washington, D. C.

HUGH M. WILKINSON,
WARREN O. COLEMAN,
New Orleans, Louisiana,
Counsel for Petitioner.

CUMMINGS, STANLEY, TRUITT & CROSS,
Washington, D. C.,
Of Counsel.